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# TRANSCRIPT OF RECORD.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1923.

**No. 130.**

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STEFANO SANGUINETTI, APPELLANT,

*vs.*

THE UNITED STATES.

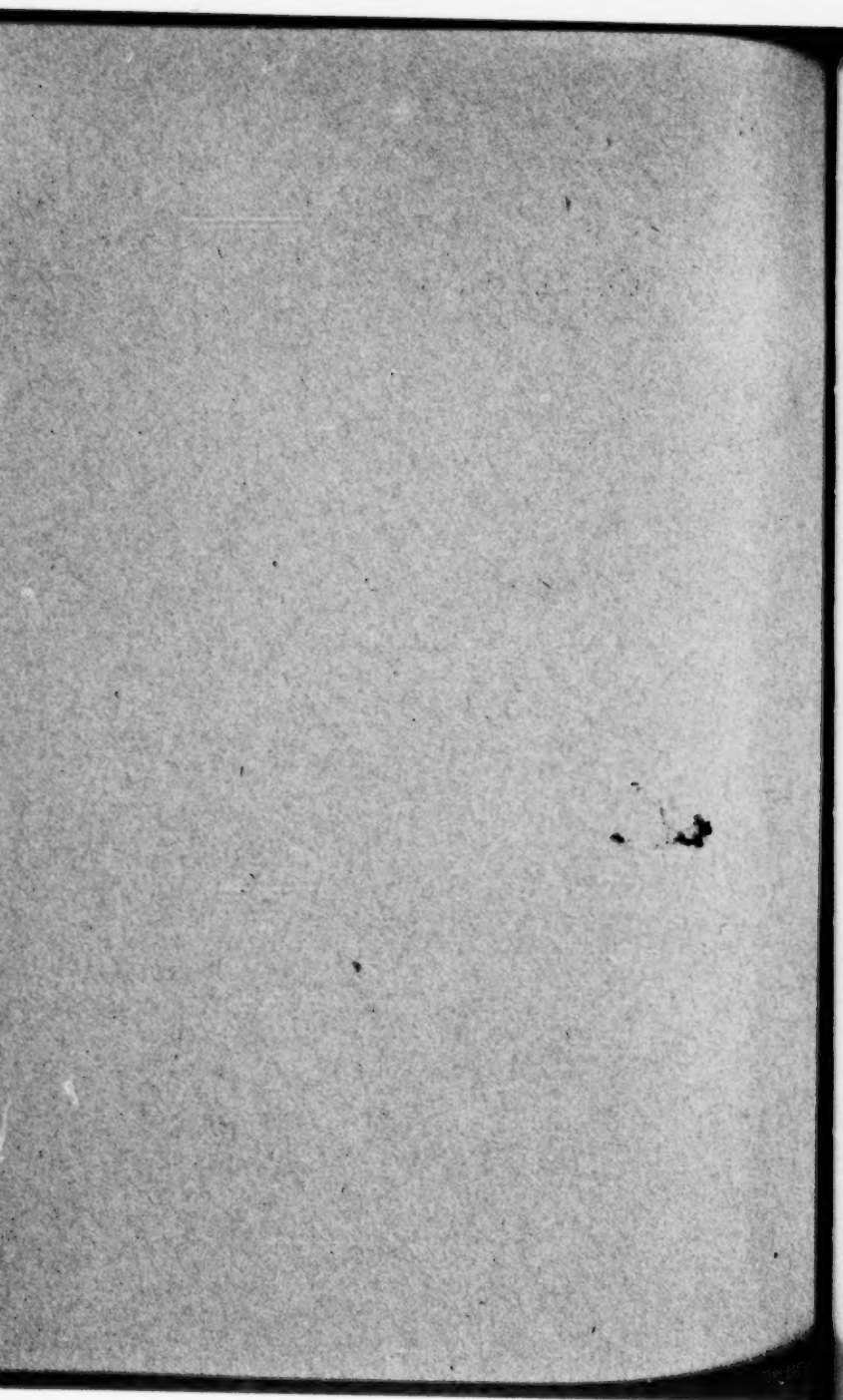
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APPEAL FROM THE COURT OF CLAIMS.

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FILED OCTOBER 2, 1923.

(29,184)



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In the Court of Claims.

No 32914.

STEFANO SANGUINETTI

vs.

THE UNITED STATES.

I. PETITION.

[Filed August 18, 1914.]

*Petition.*

To the Honorable Chief Justice and Judges of the Court of Claims:

Your petitioner respectively shows unto your Honors the following facts:

I.

Petitioner is a citizen of the United States and of the State of California.

II.

The Calaveras River rises in the foothills of the mountains to the northeast of the city of Stockton, California, and, flowing in a direction generally southwest, empties into the San Joaquin

River slightly to the northwest of said city. The Mormon Slough also rises in the foothills of the mountains to the east of Stockton, south of the source of the Calaveras River, and, flowing in a direction generally west, through the city of Stockton, empties into what is known as the Stockton Channel of the San Joaquin River on the western edge of the city of Stockton.

III.

Both the Calaveras River and the Mormon Slough have always been subject to flood stages from the rains and melting snows in the mountains, and the effect of said flood waters was to inundate, or subject to inundation, annually, a portion of the city of Stockton with the waters of Mormon Slough, but the lands hereinafter described were never submerged nor subjected to submergence by said water-courses in the flood stages.

IV.

For the purpose of relieving the city of Stockton from the conditions described by the last preceding paragraph, Congress, by the

Rivers and Harbor appropriation act approved June 13, 1902, provided as follows:

"For the rectification of the Stockton and Mormon channels at and near the city of Stockton, California, by the construction of a canal to divert the waters of the Mormon channel into Calaveras River in accordance with the report submitted in House Document numbered 152; Fifty-fifth Congress, third session, fifty thousand dollars; Provided that a contract or contracts may be entered into by the Secretary of War for such materials and work as may be necessary to complete said project not to exceed in the aggregate \$175,000 exclusive of the amounts herein and heretofore appropriated. Provided Further, that the City of Stockton, or the State of California shall first furnish to the United States the right of way for said canal."

32 Stats., Part 1, p. 358.

## V.

Subsequently thereto, the rights of way having been procured as provided in said act, the Government of the United States began the construction of the canal therein provided for, and later acts of Congress making additional appropriations, the same was completed about 1910 and the channels of the Mormon Slough and the Calaveras River were connected, the course of the canal being southeasterly to northwesterly. Said canal would not have been constructed but for the taking over of the project by the United States.

## VI.

Said canal, however, proved to be insufficient to take care of the floods waters of the Mormon Slough and in the spring of 1911 the rains and melting snows from the mountains and hills came down through Mormon Slough and were diverted into and through said canal in such volume and force that the same overflowed and the adjacent lands were submerged for a considerable distance on the north and east of said canal, while the force of the current was such that it broke through the levee on the opposite bank of the Calaveras River (the channel of which was itself insufficient to carry off its own waters and the added waters of said Mormon Slough) and flooded a very considerable area to the north and west of said river. All of said lands were in a high state of cultivation and very valuable.

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## VII.

The result of said overflow, which has since been recurrent, has been to destroy the growing crops and cover portions of the overflowed region with said gravel, noxious weeds and other obstructions to cultivation; on other portions to wash away the topsoil completely down to bedrock, rendering the same unfit for cultivation; to demolish and injure the fences, buildings, fruit trees and vines and other improvements and, generally, to do the damage that would

naturally ensue upon floods of volume and violence. Beside the direct damage done by the flood of 1911 and subsequent recurrences, the danger and probability of future recurrences of floods have so diminished the value of the lands subject to overflow that they are now worth but a fraction of their former value. Some of the lands when overflowed must be pumped out at great expense and the protective works rebuilt.

### VIII.

Some of the land within the overflowed area was in the possession of the owners thereof, who were cultivating the same or using it for the other purposes for which it was susceptible, while other portions of said land were leased to tenants, who were cultivating it on shares or leasing for a money rental.

### IX.

The effect of said construction work by the United States was, and has been, to take the property of the owners and tenants of land within said flooded area, including petitioner, by reason of which petitioner has been damaged in the sum shown by his bill of particulars hereunto annexed, for which amount petitioner prays judgment against the United States, no part of the same having been paid, and petitioner's rights thereto not having been sold or assigned. Stefano Sanguinetti, By Benj. Carter, His Attorney in Fact. F. Carter Pope, Of Counsel.

DISTRICT OF COLUMBIA, ss:

Before me, Francis L. Neubeck, a Notary Public in and for said District, Benjamin Carter, whose name is signed to the foregoing petition as Attorney in Fact for the petitioner therein named, made oath on this, the 12th day of August, 1914, that the allegations of said petition are true to the best of his knowledge, information and belief. Benj. Carter.

Sworn to and subscribed before me the day above written. Francis L. Neubeck, Notary Public, District of Columbia.

In the Court of Claims.

### BILL OF PARTICULARS.

The United States to Stefano Sanguinetti, Dr.

To value of 40 acres of land, in San Joaquin County, California, taken by the construction of the Stockton Diverting Canal at \$500 per acre.....	\$20,000.00
To value 20 acres of orchard at \$1,000 per acre.....	\$20,000.00
Residence valued at \$10,000, and barns, outhouses and other improvements valued at \$6,000 destroyed by flood of 1911.....	\$16,000.00
<b>Total</b> .....	<b>\$56,000.00</b>

In the Court of Claims.

## II. GENERAL TRAVERSE.

No demurrer, plea, answer, counterclaim, set-off, claim of damages, demand, or defense in the premises, having been entered on the part of the defendants, a general traverse is entered as provided by Rule 34.

## III. HISTORY OF PROCEEDINGS.

On July 17, 1916, a joint motion of parties was filed to consolidate the cases of Theodore Infalt, No. 31191; Richardson Russell Smith, No. 32901; Silva Sanguinetti, No. 32913 and Stefano Sanguinetti, No. 32914.

On July 24, 1916, the court ordered that "ht- esveral cases may be heard together as individual cases."

## IV. ARGUMENT AND SUBMISSION OF CASE.

On December 3, 1919, this case was argued and submitted by Messrs. Benj. Carter and F. Carter Pope, for the plaintiff, and by Mr. Philip G. Walker, for the defendant.

8      V. *Findings of Fact, Conclusions of Law, and Opinion of the Court by Downey, J., Concurred in by Graham, Hay, Booth, Judges, and Campbell, Ch. J.*

Entered Feb. 16, 1920.

No. 32914.

STEFANO SANGUINETTI

v.

THE UNITED STATES.

No. 32913.

SILVA SANGUINETTI

v.

THE UNITED STATES.

No. 32901.

RICHARD RUSSELL SMITH

v.

THE UNITED STATES.



No. 31191.

THEODORE INFALT

v.

THE UNITED STATES.

NOTE.—These cases are not consolidated but were submitted together and since many of the detailed findings are applicable to the general situation and to all cases, the findings are made in this form. The particular facts applicable to each individual case are separately stated in separate findings.

These cases having been heard by the Court of Claims the court, upon the evidence, makes the following

## FINDINGS OF FACT.

## I.

Claimants are citizens of the United States and reside in San Joaquin County, Calif. They have always borne true faith and allegiance to the United States, and have never voluntarily given aid or comfort to its enemies.

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## II.

The Calaveras River, having a drainage area of about 491 square miles, rises in the foothills of the Sierra Nevada Mountains, to the northeast of the city of Stockton, Calif., and flowing in a generally southwesterly direction passes to the north of the city of Stockton and empties into the San Joaquin River about  $2\frac{1}{2}$  miles below the mouth of a channel, known as Stockton Channel, about  $2\frac{1}{2}$  miles in length and 150 feet wide, which connects the city of Stockton with the San Joaquin River, a tidal stream flowing into San Francisco Bay. Stockton is a commercial and manufacturing city of about 27,000 inhabitants. It is the upper terminal of the greater part of the commerce of the San Joaquin River. The water-borne commerce of Stockton amounts to approximately 500,000 tons annually valued at about \$30,000,000, and for many years, beginning in 1885, the Government had been attempting to maintain by dredging, with only partial success, a depth of 9 feet at low water in said Stockton Channel, at an average annual expense of over \$7,000.

## III.

The Calaveras River comes out of the foothills of the mountains near Bellota which is about 16 miles northeast of Stockton. Above and again nearer Bellota the river divides and flows in different channels, the capacity of which is so limited that during freshets a considerable part of the waters flow across the country, not uni-

formly distributed but for the most part carried in shallow depressions or swales extending in the direction of the general slope which is from northeast to southwest.

Near Bellota and now confluent with the Calaveras River is the head of Mormon Slough, which runs thence in a southwesterly direction, bending gradually to a nearly westerly direction toward Stockton, passing through the southern part of the city of Stockton, and emptying into Stockton Channel about 1 mile below its head. It is navigable for about  $1\frac{3}{4}$  miles above its mouth, and there constitutes a part of the commercial water front of the city. The course of the Calaveras River from Bellota is westwardly, thence northwestwardly, thence southwestwardly, passing north of Stockton to its confluence with the San Joaquin River, approximately 2 miles northwest of Stockton. Gradually diverging below Bellota the Calaveras River and Mormon Slough attain a distance apart of approximately 7 miles, whence they converge to a distance of approximately 4 miles at a point opposite the junction of the diverting canal with the Mormon Slough.

A map entitled "Stockton and Mormon Channels, Stockton Diverting Canal and Vicinity," issued out of the United States Engineer Office, San Francisco, Calif., March 19, 1913, over the signature of S. A. Cheney, major, Corps of Engineers, United States Army, in evidence as a part of House Document No. 256, Sixty-third Congress, first session, to which it is attached, is made a part of these findings by reference without printing herein.

The Calaveras River was and is a "rainy weather" or "wet season" river, supplied by rains exclusively or very nearly so, rising and falling in proportion to the rainfall and dry during a portion of each year and Mormon Slough possessed much the same characteristics except that after the diversion to it of a part of the waters of the river it carried more water than the river and became practically the main channel. Until about 1862 the low water flow of the Calaveras River was carried in what was known as the Old Calaveras River, none of it passing into Mormon Slough, but after a very high water in 1862 the flow was largely diverted into Mormon Slough. One tradition is that the flood of 1862 so filled the channel of the river with mining debris that its waters were thereby diverted into the slough while another is that ranchers along the slough, desiring the use of the water, cut a canal connecting the slough with the river and thus diverted the water, the slough enlarged by erosion assisted by the breaking up of the hard-pan by the ranchers where it interfered with erosion, and the slough became the principal water course. In 1887 ranchers on the Calaveras River diverted the water back into the Old Calaveras River, a suit was instituted by ranchers on the slough because of the wrongful diversion of the water and it was decided in their favor, the court holding that the slough had become in fact a channel of the Calaveras River.

Later, the ranchers along the Calaveras, being unable to obtain the water for irrigation and other purposes and finding an opportunity to relieve themselves from floods, encouraged the flow of the

waters into Mormon Slough by aiding natural erosion thereof and also aiding natural growths and consequent silting in the old channel. On the other hand, the ranchers along the slough, finding later that the enlargement of the slough and the increase of the flow of the water therein was increasing their liability to damaging floods undertook to divert the water by way of North Channel, a minor channel which left the main channel of the Calaveras above the head of Mormon Slough and reentered it about 2 miles below, but Mormon Slough had become so enlarged and the old channel of the Calaveras had so filled up and was at such higher elevation that their purpose was not accomplished.

The territory lying between the Calaveras River and the Mormon Slough had always been subject to flooding to a greater or less extent caused by breaks in the low levees along the Calaveras and the slough or the overflow of those streams and heavy rainfalls on the area, and the city of Stockton had been subject to frequent floods, but they were not serious, as most of the flood waters passed to the north of the city, until the Mormon Slough became the principal outlet of the upper Calaveras River and the principal drainage channel for the contiguous watershed. In periods of high water the slough carried large quantities of sediment, and prior to the construction of the diverting canal this sediment was deposited near its mouth and in the Stockton Channel, interfering with navigation and entailing necessary annual expense for dredging, in addition to which the water carried by the slough frequently flooded portions of the city of Stockton.

#### IV.

After an investigation followed by report and recommendation to Congress, House Document 152, Fifty-fifth Congress, Third session, Congress, by a provision in the rivers and harbors appropriation act of June 13, 1902, 32 Stat. 331 at 368, appropriated  
 11 \$50,000 "For the rectification of the Stockton and Mormon Channels at and near the city of Stockton, Calif., by the construction of a canal to divert the water of the Mormon Channel into Calaveras River" in accordance with the report referred to above, and authorized contracts by the Secretary of War for the completion of the work not to exceed \$175,000.

In addition to the construction of the canal proper the project, as recommended, contemplated the construction of four highway bridges over the canal on roads intersected thereby and also contemplated an increasing of the capacity of the Calaveras River below the mouth of the canal by dredging and the raising of the levee on the north bank thereof opposite and below the mouth of the canal by use of the dredged materials.

The names "Mormon Channel" and "Mormon Slough" were and are used with reference to the same water course, the name "Mormon Channel" coming to be applied after it had become the chief water course in its relation to the Calaveras River and more particularly to its lower portion in and near the city of Stockton, a part of which was navigable and used as a commercial water way.

Accordingly the United States constructed through a soil consisting of 1 to  $1\frac{1}{2}$  feet of light adobe superimposed on a red, sandy clay, a canal 150 feet wide on the bottom, 7.9 feet deep, with banks to a slope of  $1\frac{1}{2}$  on 1 and about  $4\frac{1}{2}$  miles in length, intersecting Mormon Slough about 3 miles above or east of Stockton and running in a northwesterly direction to and into the Calaveras River, and constructed a dam across Mormon Slough just below the intersection of the canal, for the purpose of diverting the waters of the slough through the canal and into the Calaveras River and thence into the San Joaquin River below the mouth of Stockton Channel, and thus preventing the filling up of that channel and obviating the necessity and expense of the frequent dredging thereof. Another anticipated result was to prevent the flooding of the city of Stockton. The canal was completed March 18, 1910.

The canal was constructed on a right of way 400 feet in width and so located that there remained an unexcavated bank on the northeast side, within the right of way, and on the southwest or lower side a levee was constructed of the materials excavated from the canal. The dam across Mormon Slough was practically a continuation of this levee.

There were low levees along Mormon Slough above the intersection of the canal, the extent of which, however, are not accurately shown, and there were levees along the Calaveras, both above and below the mouth of the canal, for the protection of farming lands, much of which were reclaimed lands and very low.

Many thousands of acres of land to the north of the Calaveras were swamp lands originally covered by water, mostly from the San Joaquin River, and in addition to their reclamation by private systems of reclamation levees and draining, mostly by pumping, their owners had cooperatively built the levee along the north side of the Calaveras for their protection. In dredging the Calaveras below the mouth of the canal to increase the capacity of the river and care for the increased flow of water the dredged materials were placed on this levee up to a point a short distance above the mouth of the canal,

and it was thereby very much widened and raised and strengthened. It was not made of such width and height as it

was because of assumed necessity for so much strengthening, but because of the excess quantity of materials to be disposed of. The levee further eastward along the Calaveras remained as theretofore constructed and maintained—lower, lighter, and of less strength. In 1910 some time after the completion of the project, a “self-appointed committee” of landowners on the north side of the Calaveras requested of an engineer officer of the United States representing the district engineer that the old levee to the eastward on the north side of the Calaveras be strengthened by the United States to obviate danger of their lands being flooded, but he expressed the opinion that the canal had been so constructed as to maintain conditions as they were, and declined to recommend that this work be undertaken by the United States.

The waters which left the Old Calaveras River and flowed into Mormon Slough at their junction were never returned to the Cala-

veras until their diversion by and after the construction of the canal and dam. Waters overflowing the upper Calaveras and slough onto the area between them and other waters finding their way onto that area by rainfall or otherwise did not find their way into the slough nor into the Calaveras above the canal, but flowed over that area in a generally southwesterly direction with the slope of the area, moving in depressions or swales to the extent of their capacity and then over the other parts of the area, until they found their way into the canal and, diverted thereby, were carried thence into the Calaveras. This area had a fall from the northeast to the southwest of approximately 5 feet to the mile. In adopting the plan for this work it was contemplated that the waters flowing over this area which otherwise would have continued on toward Stockton should be intercepted by the canal and thus diverted to the Calaveras.

## V.

High waters in the Calaveras River section generally occur during January, February, and the earlier part of March and, to a greater or less degree, dependent on the amount of rainfall, are of almost annual occurrence. The waters rise and recede rapidly and flood conditions are frequently of recurrence in the same year during those months.

At the time the diversion canal project was prepared, which was in 1898, several years before its actual construction, there was but little available data as to the flood discharge of the Calaveras River and Mormon Slough. There was no gauge until December, 1906, when a gauge was established by the Weather Bureau near Jenny Lind on the Calaveras, about 25 miles above the canal, after which daily gauge heights at that point were obtainable, but conditions below were not accurately indicated thereby.

In January, 1911, there were two high waters which were of minor importance except for their effect in leaving the water shed in favorable condition for the heavy subsequent run off, which, by reason of very heavy rains, came on the 30th and 31st of January, 1911, and was an unprecedented flood unless the flood of 1862 may have been greater as tradition has it. The levees on the Old Calaveras River, and on the Mormon Slough, between Bellota and the canal were broken in several places so that they had little effect in confining the course of the water. Some of it flowed south of Mormon Slough, and some north of the Calaveras, but the greater part of that beyond the capacity of the river and slough flowed across the country between the river and the slough. From a large break in the levee above Linden, which is about 4 miles below Bellota, the Linden Road, which is in a natural trough, carried a large volume of water. The waters flowing in the slough in great volume and to its capacity were diverted by the dam into the canal except as to some overflow which passed on toward Stockton, and the large volume of water flowing over the country between the slough and the Cala-

veras was intercepted by the canal and the aggregate volume turned toward the Calaveras, but the volume was in excess of the capacity of the canal and also, when combined with the waters in the Calaveras, in excess of the quantity which could find a ready and rapid outlet down that stream, with the result that, by reason of the excess quantity of water reaching the canal and the retarding of its flow by the waters in the Calaveras, and also, to some extent by the bridges over the canal, the lands above or to the northeastward of the canal and for the full length thereof were overflowed, the overflow extending in varying depths from one-half to 1 mile, according to the contour of the land, the greatest distance and depth occurring in the pocket formed by the canal levee and the levee on the north bank of the Calaveras, where a lake was formed. The waters flowing in and parallel with the canal, moving in greater volume and with greater force than those in the Calaveras, threw the current of the river to the levee on the north bank and backed up the waters of the Calaveras, to the northeast. Across the Calaveras River, approximately 500 feet below the mouth of the canal, was a bridge or trestle of the Southern Pacific Railroad which to some extent obstructed the flow of the waters and contributed to the backing up thereof. A result of the backing up of the waters in the Calaveras and the embanking of them against the levee on the north bank thereof was a break in that levee at a point above and opposite the mouth of the canal and the break was soon enlarged by erosion. On the north of the river below or westward from this break was an embankment of the Southern Pacific Railroad, containing a 15-foot trestle and two small culverts, and this embankment tended to restrain the waters flowing through this break and also flowing down on the north side of the river and, in a triangular pocket between it and the levee on the north side of the river, another lake was created contiguous to that on the other side above the canal. Low-lying lands, extending for a considerable distance north of the river and for some considerable distance both above and below this break in the Calaveras levee, were flooded, but the waters flowing through the break were not the only cause thereof. Waters flowing down the north side of the river from breaks above and in waterways on that side thereof contributed thereto. The proportionate contribution from either source does not appear and is speculative.

The years 1912 and 1913 were comparatively dry years and there were no high waters of consequence, but in 1914, 1915, 1916, and 1917 there were floods which to a greater or less extent inundated the lands northeast of the canal. By reason of the filling of the canal by deposits during successive floods a less volume of water  
 14 caused a flooding of these lands. In 1914, when the highest water after 1911 occurred, it attained a height on these lands within 1 foot of that of 1911 and in this year the flood again broke through the levee on the north side of the Calaveras which had been in some manner repaired after the flood of 1911.

The duration of flooded conditions on these lands varied, dependent on the duration of the rains causing them and the time necessary for the accumulated waters to find their way down the Calaveras.

Sometimes floods ran off in a few hours. In 1911 flood conditions lasted for two days. At times in later years as one flood ran off a recurrence of heavy rains caused a recurrence of flood conditions. The rapid run off of floods immediately cleared these lands of water except as to low places having no outlet where the water remained in pools until absorbed by the earth.

During the flood of 1911 a large quantity of water flowing over the area between the Calaveras River and Mormon Slough flowed onto the lands northeast of the canal and would have flowed thereon if the canal had not been constructed. To what extent these waters in 1911 would have accumulated on, flooded or damaged these lands but for the canal does not specifically appear and is speculative.

It is shown that lands in this area lying  $2\frac{1}{2}$  miles east of the canal and about the same distance north of Mormon Slough were flooded twice in 1907 to a depth of approximately 3 feet and that they were always flooded during heavy rains when the levees broke up near Bellota and that the lands in that vicinity were flooded "about one year out of three" to a greater or less extent. Whether the same conditions prevailed in other localities within this area and nearer the site of the canal is not directly shown. High-water marks exhibited to United States engineers investigating conditions indicated that "the whole country" in the vicinity of the canal was subject to overflow before its construction, in times of extreme high waters, but just what the flood conditions were in this area or in particular parts thereof, except as stated in these findings, is not specifically shown.

## VI.

The general effect of these floods on these lands northeast of the diverting canal, varying at different points as conditions varied, was as follows: In some cases some of the top soil, where the ground was freshly plowed and the current swift, was washed off. Noxious weeds and grasses and logs and stumps were sometimes carried onto portions of the lands. It required labor to clear off the weeds and grasses and, if neglected, they sometimes took root and rendered cultivation more difficult. Logs and other timber carried onto the lands were generally collected and used for fire wood. The lands were mostly alkali and the water served to bring the alkali to the surface. If washed off by the water, as frequently happened, the effect was beneficial, otherwise detrimental. The lay of the surface of the land was altered to some minor extent, principally by deposits of silt, sometimes filling irrigation ditches and requiring their cleaning out. Silt was deposited on the lands which was generally beneficial, enriching and increasing the productivity of the soil, but it was otherwise occasionally where there were some deposits of sand or gravel. Some fruit trees were injured by the water, many others not, and occasionally trees were uprooted by the force  
 15 of the water. Grain crops, such as barley, a good deal of which was grown in this country, were damaged by being  
 flooded, but alfalfa was generally benefited if the water readily ran  
 off within a few days. Dependent largely on the time of a flood,



inability to plow the lands until they had sufficiently dried out sometimes delayed planting beyond the usual time, but it does not appear that the cultivation of any of the lands here in question in some suitable crop was prevented by the floods. Corn, potatoes, and some other crops could be successfully planted in this locality as late as the 1st of May.

## VII.

Claims for damages alleged to have been caused by the overflow of 1911 were, by these plaintiffs and by many other landowners in the vicinity of the diverting canal and north of the Calaveras River, about seventy in all, presented to the United States through the engineering officers, the aggregate amount thereof exceeding half a million dollars. A bill was introduced in the Senate on the 1st of August, 1912 (S. B. 7405, 62d Cong., 2d sess.), providing for the payment of 20 enumerated claims, Stefano Sanguinetti among them, and those claims were referred to the Engineer Corps, War Department, for investigation and report. Many other claims were then on file in that office. No action was had on the Senate bill referred to after its reference to the Committee on Claims. These actions were commenced in this court in August, 1914.

## VIII.

It is not shown either directly or inferentially that the United States or any of its officers acting for or in their behalf, in the preparation of the plans for the diverting canal or in its construction had any intention to thereby flood any of the lands here involved or had any reason to expect or anticipate that such results would follow. The fact that the canal was of insufficient capacity to care for the waters coming down Mormon Slough augmented by the waters flowing to it over the area between the slough and the river, during periods of very heavy rains and extremely high water, was an engineering mistake due to lack of accurate information as to the conditions to be met during such periods. The engineers of the United States who made the preliminary examination and recommended the plan reached the conclusion, based on such information as they had, that the canal as proposed would have a greater capacity than would be required for the expected volume of water to be carried and that the Calaveras River below the mouth of the canal, when dredged as recommended, would have a capacity considerably in excess of the combined volume of water to be carried by it. The canal was constructed as recommended by the Government engineers. Work was done on the Calaveras below the mouth of the canal both by dredging and by depositing the dredged materials on the levees on the north side, but whether this part of the work was completed as recommended does not satisfactorily appear.

## IX.

The flood of 1911 had been of such magnitude that some of the waters breaking through the small levees along Mormon



16 Slough on the south side and otherwise overflowing its banks and to some extent escaping at the dam had followed approximately the old course of the slough to Stockton and deposited silt in portions of Mormon and Stockton channels and the river and harbor act of July 25, 1912 (37 Stat. 201-230), authorized and directed the Secretary of War to cause various preliminary examinations and surveys to be made, among them being—

“Stockton and Mormon channels, California, including the diversion canal, with a view to determining what, if anything, may or should be done by the United States, either alone or in conjunction with the city of Stockton and the State of California, or with either of them, in order to increase the capacity of said diversion canal from its upper end in Mormon Channel to the mouth of Calaveras River in the San Joaquin River, so that said canal shall carry the entire flood flow of Mormon Channel and thus prevent the deposit of material in the navigable portions of Stockton and Mormon channels.”

The District Engineer of that district made a report to the Chief of Engineers, August 12, 1913, in which he reviewed conditions, particularly with reference to the flood of 1911, and suggested plans which might be adopted, “should the United States decide to relieve existing flood conditions.”

He concluded “that the project for Stockton and Mormon channels, including the diversion canal,” was unsatisfactory because—

“(a) It has not entirely prevented deposit of silt in Stockton and Mormon channels,

“(b) It has been made the basis of claims against the United States for damages due to flooding,

“(c) It has not provided bridges appropriate to the traffic to be carried and the highway system to which they belong.”

expressed the opinion—

“That such silt as now reaches the navigable portions of Stockton and Mormon channels can best be removed by dredging; that the United States should not pay any damages due to flooding; and that the United States should not reconstruct the bridges across the diverting canal.”

and by way of recommendation said,

“Under the circumstances, I do not consider that the interests of navigation warrant the expenditure by the United States of more money on the project or any considerable elaboration of it, and no survey is recommended.”

The views expressed in this report were concurred in by the division engineer, the report was examined, commented on and concurred in by the “Board of Engineers for Rivers and Harbors,” the views of the district engineer, the division engineer, and the

board of engineers were concurred in by the Chief of Engineers, who, however, expressed the opinion that the project had fairly well served the purpose for which it was designed, and these reports were, by the Secretary of War, transmitted to the Speaker of the House of Representatives, referred to the Committee on Rivers and Harbors, and printed in House Document 256, Sixty-third Congress, first session, in evidence in these cases.

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X.

The act of Congress (32 Stat. 331 at 368) which appropriated for and authorized the construction of the diverting canal contained a proviso as follows:

"Provided further, That the city of Stockton or the State of California shall first furnish to the United States the right of way for said canal."

The Legislature of the State of California, by an act entitled:

"An act authorizing the commissioner of public works to obtain a right of way for a canal to divert the waters of Mormon Channel into the Calaveras River, to maintain condemnation suits therefor, and making an appropriation to pay for said right of way and costs and expenses of obtaining the same," approved March 25, 1903, authorized the commissioner of public works to obtain, either by purchase or condemnation suits, a right of way for such diverting canal. The commissioner of public works thereafter acquired, in most cases by grant but in some cases by decree of condemnation, the right of way for said canal and thereafter by his proper indenture, dated February 6, 1907, duly acknowledged and recorded and in which he made specific reference to each grant to him and to each order of condemnation in his favor, he conveyed the right of way to the State of California pursuant to direction contained in an act of the Legislature of that State.

Thereafter, pursuant to an act of the Legislature of the State of California, directing the governor of the State to execute and the secretary of state to countersign and deliver a conveyance of said right of way to the United States, the governor of the State of California, in the name of the State, by his letters-patent dated March 28, 1907, duly acknowledged by the governor and countersigned and delivered by the secretary of state on the same day, conveyed said right of way to the United States.

## XI.

(No. 32914.)

Stefano Sanguinetti, the plaintiff in case No. 32914, was at and before the time of the building and completion of the diverting canal and until May 27, 1915, the owner of a tract of land containing, before the right-of-way conveyance hereinafter referred to, approximately 200 acres which bordered in part on the south side

of the Calaveras River and extended southeastwardly in the general direction of the diverting canal thereafter constructed.

The right of way for the diverting canal extended through and divided these lands, leaving the larger part on the southwest or lower side of the right of way, but leaving on the northeast or upper side two triangular tracts containing together about or a little more than 60 acres. Condemnation proceedings were instituted by the commissioner of public works for the condemnation of the right of way through these lands, but at some time before final decree and on the 3d day of May, 1906, Stefano Sanguinetti, his wife joining, executed to Frank D. Ryan, commissioner of public works for the

State of California, a deed for the right of way for the diverting canal through these lands, which deed, with the certificate of acknowledgment and indorsement thereon, is as follows:

"Whereas, by an act of the 57th Congress, passed at its first session in 1902, an appropriation was made, to be expended under the direction of the Secretary of War and the supervision of the Chief of Engineers, for the rectification of Stockton and Mormon channels at and near the city of Stockton, California, by the construction of a canal to divert the waters of the Mormon Channel into the Calaveras River, provided the city of Stockton or the State of California furnish to the United States the right of way for said canal and

"Whereas, by an act of legislature, approved March 25, 1903, the commissioner of public works was authorized to obtain, by purchase or by condemnation suits, a right of way for such diverting canal from the Mormon Channel to the Calaveras River east of the city of Stockton, in San Joaquin County, and along the channel of said Calaveras River as far as may be necessary, according to the surveys for such canal adopted by the United States Government; and

"Whereas, according to the surveys for such canal adopted by the United States Government, the hereinafter-described land is a necessary part of the right of way for such diverting canal; and

"Whereas, Frank D. Ryan is such commissioner of public works:

"Now, therefore, in consideration of the premises and in consideration of the receipt of the undersigned of the sum of five dollars (\$5) in gold coin of the United States of America, and of other valuable considerations, the receipt of which by the undersigned is hereby acknowledged, the undersigned hereby grants, sells, and conveys unto the said Frank D. Ryan and to his successor or successors in office (and to his or their assigns, the city of Stockton or the State of California, if conveyance to either is, or becomes, or should be proper, convenient, or necessary in order to convey the same to the United States of America) and to his or their assign, the United States of America, the right of way for such diverting canal over, across, upon, in, through, or under all that certain piece or parcel of land situated, lying, or being in the county of San Joaquin, State of California, particularly described as follows to wit:

"Portions of sections 29, 41, and 42 of C. M. Weber's grant, 'El Rancho del Campo de los Franceses:'

"Beginning at the point of intersection of the north line of San Joaquin County survey No. 2873, with the west line of that portion of San Joaquin County, survey No. 1345, which lies in section 41 of C. M. Weber's grant 'El Rancho del Campo de los Franceses,' said point being a corner of said survey No. 1345; and run thence north 73 deg. 60' east 281.7 feet; thence south 61 deg. 45' east 2,327 feet; thence south 17 deg. 00' east 237 feet; thence south 73 deg. west 326 feet; thence north 61 deg. 45' west 5,062 feet; thence north 75 deg. 10' west 305 $\frac{1}{2}$  feet to east line of lands of M. A. Podesta; thence north 17 deg. 00' west 138 feet to center line of the Calaveras River; thence upstream, along the center line of the Calaveras River, north 84 deg. 10' east 260 feet; thence north 63 deg. 30' east 250 feet; thence north 65 deg. 50' east 30 feet; thence south 61 deg. 45' east 2,397 feet; thence south 17 deg. 00' east 284 feet to the point of beginning, and containing 48.71 acres.

19 "Together with the right of ingress and egress to and from the same and the right to dig, build, construct, and maintain said diverting canal upon such right of way and within the limits of said parcel of land, on the part of the United States of America, its officers, engineers, agents, employees, servants, or contractors and their subcontractors, officers, engineers, agents, employees, and servants.

"And together therewith such of the tenements, hereditaments, and appurtenances thereunto belonging or in anywise appertaining as may be necessary, convenient, or proper to accomplish such purposes and the objects of such and other statutes.

"To have and to hold, all and singular, the said premises, together with such rights, tenements, hereditaments, and appurtenances for the uses and purposes aforesaid unto the commissioner of public works, his said successors and assigns forever.

"It is expressly admitted and understood by the undersigned that the intent of this grant of such right of way is to grant such a right of way and in such form that such project may be accomplished properly, expeditiously, and fully by such public authorities.

"In witness whereof, the undersigned has hereunto set his hand and seal this third day of May, A. D. 1906. Stefano Sanguinetti. (Seal.) Geromina C. (her x mark) Sanguinetti. (Seal.)

his wife.

"Geromina C. Sanguinetti being unable to write, she made her mark in my presence and I wrote her name at her request and in her presence. E. L. Wilhoit."

"Also witness to the mark and signature of Geromina C. Sanguinetti. Thos. S. Louttit. (Seal.)"

"STATE OF CALIFORNIA,

*"County of San Joaquin, ss:*

"On this third day of May, in the year one thousand nine hundred and six, before me, E. L. Wilhoit, a notary public in and for the said county of san Joaquin, State of California, residing therein, duly commissioned and qualified, personally appeared Stefano San-

guinetti and Geromina C. Sanguinetti his wife, known to me to be the persons described in, whose names are subscribed to, and who executed the annexed instrument, and acknowledged to me that they executed the same.

"In witness whereof I have hereunto set my hand and affixed my official seal at my office in the city of Stockton, county of San Joaquin, the day and year in this certificate first above written. E. L. Wilhoit, Notary Public in and for the County of San Joaquin, State of California. (Seal.)"

"(Indorsed:) Deed of right of way, diverting canal, Stefana Sanguinetti and wife to Frank D. Ryan, as commissioner of public works. D-25. Recorded at request of Ashley and Neumiller, May 3, 1906, at 21 min. past 11 o'clock a. m., in Book A, vol. 145 of Deeds, page 396, San Joaquin County records. Otto Von Detten, recorder. (16.) Office of Chief of Engineers, Nov. 20, 1907. 20 25746-157. War Department. Office of the Secretary, Nov. 20, 1907. 1937-116. War Department."

This deed is specifically mentioned in the deed of the commissioner of public works to the State of California, referred to in Finding VII, as one of the grants by which the right of way for the canal was conveyed to him, said commissioner.

The consideration paid to said Stefano Sanguinetti for said conveyance by him of said right of way was \$14,000.

## XII.

The portion of Stefano Sanguinetti's land left on the northeast or upper side of the canal right of way was in two separate triangular tracts of approximately the same size, which contained in both sixty or more, probably sixty-six and a fraction, acres.

One tract, which for convenience of reference is designated tract No. 1, was in the V-shaped junction between the canal right of way and the Calaveras, the Calaveras side running in curves and irregularities with the meanderings of the river, the right of way side running in a straight line with the line of the right of way and about .44 of a mile in length. The east side was a straight north and south line. The other tract, which for convenience is referred to as tract No. 2, laid further southeastward, along the canal right of way and at its nearest point was distant from tract No. 1, along the line of the right of way, about 400 feet. It was in the form of a right-angled triangle with the hypotenuse on the line of the right of way and about .43 of a mile in length, the other sides being of approximately equal length.

Previous to the flood of January 30-31, 1911, the greater portion of both of these tracts was under cultivation in orchard consisting of cherry, apricot, pear, peach, plum, fig, and perhaps other trees to the amount of about 17 acres on tract No. 1, and vineyard, vegetables, barley, and alfalfa. There was approximately 20 acres which was

not under cultivation but whether because unfit for cultivation or for some other reason is not shown. For some crops cultivation by irrigation was necessary, for others desirable but not necessary, and this was accomplished by the use of water pumped from shallow wells. The water plane was an average of approximately 10 feet below the surface of the land.

On tract No. 1 was the Sanguinetti residence, a large two-story brick house built by Stefano Sanguinetti, and of the value of \$10,000. It was located about 500 feet from the canal right of way and 800 feet from the Calaveras River at their nearest points and 1,700 feet from their junction. It was constructed on ground of approximately 1 foot higher elevation than that along the right of way at its nearest point, and was so elevated on its foundations that the first main floor and the verandas were approximately 6 feet above the surrounding ground. In the vicinity of the house were two barns and other necessary outbuildings. One of the barns was very old and originally of poor construction, but the other was comparatively new and well built.

The surface of tract No. 1 was generally even but with some comparatively low places, and the slope from high to low points was about 2 feet. The elevation on the east side at the right-of-way line, being the south end of the east line, was substantially the same as in the north corner, being the north end of the east line, and these elevations were approximately 2 feet higher than the elevation in the pocket near the junction of the right of way and the river. In some places the elevations north of the right-of-way line were lower than the right-of-way line immediately south thereof. The variations in elevation of tract No. 2 were slight, varying to a maximum of approximately  $2\frac{1}{2}$  feet, and the difference in elevation between the land in the right angle, most remote from the right of way, and that along the right of way was from approximately 1 to  $1\frac{1}{2}$  feet.

The flood of January 30-31, 1911, covered both of these tracts to an approximate depth of from  $2\frac{1}{2}$  to  $4\frac{1}{2}$  feet with some slightly greater depth over a few low places. The water immediately surrounding the residence attained a depth of near  $3\frac{1}{2}$  feet, or approximately  $2\frac{1}{2}$  feet below the main or first floor, and flooded the basement or cellar. As the flood increased, the water moved in the canal with considerable rapidity, and for a time flowed over a part of the land, particularly that in and toward the pocket, with a rather strong current, but when the coming together of the waters in the canal and river had so augmented the volume that it could not find a ready outlet and began to back up in the river the water over these lands became sluggish and moved with but little current. This flood continued for about two days, but what its varying stages during that period were, except the maximum as stated, is not shown.

At the residence the front steps to the veranda were washed away. It is not satisfactorily shown that the house was otherwise damaged or rendered in any wise uninhabitable or unsafe for occupancy. It was in good condition inside and out after this and subsequent floods.

Stefano Sanguinetti lived in this house during this flood and continued to live there until some months after the flood of 1914, when he moved to Stockton. It is asserted that he was "driven out by the floods." It does not appear that there was any reason why he might not have continued in the occupancy of the house except the inconvenience entailed during the brief periods when it was surrounded by water. One of his sons was farming the land during 1911 and subsequently as a tenant. The amount of actual damage to the house by the flood of 1911 is not shown, but it was negligible. It was not materially depreciated in value by that flood. It was depreciated in value by that flood in conjunction with floods of subsequent years, indicating a continuing danger of recurrence of floods in flood seasons and consequent inconvenience. That depreciation was 25 per cent of its value.

A very old barn, already in bad condition, was so damaged as to be unfit for further use by the flood of 1911. Its value was \$400. The newer, better-constructed barn, was not damaged. A chicken house was washed away, but its value is not shown.

There were about 1,500 fruit trees on tract No. 1. A few, the number not shown, were uprooted during the flood of 1911. Others died thereafter, but how many, if any, died from the effect of the flood is not satisfactorily shown. The damage in the aggregate to the orchards by this flood was \$500.

These two tracts of land, aside from the orchard, by reason of the deposits of weeds and debris, necessitating clearing off, filling of ditches, etc., and some deposits of sand and gravel, offset by deposits of valuable silt, were damaged by the flood of 1911 to the amount of \$300.

By reason of the thereafter apparent liability to frequent recurrence of floods on these lands, they, exclusive of the residence, were depreciated in value \$2,000. Some crops upon these lands were damaged or destroyed by the flood of 1911, but compensation for all such loss is claimed by Silva Sanguinetti as tenant and sued for by him in case No. 32913.

None of this land was permanently overflowed nor was it overflowed for such length of time, either in 1911 or subsequent thereto, as to prevent its use for agricultural, horticultural, or orcharding purposes. It has been cultivated and the products of the orchard marketed each year since the flood of 1911, and there have been recurrent floods of greater or less magnitude each year except the dry years of 1912 and 1913. In 1914, after the floods of that year, there was a less proportionate area not under cultivation than before 1911. Of a total area of 66.62 acres, 15.67 were not under cultivation. The buildings and roads occupied 2.26 acres, 17.77 acres were in orchard, 404 acres in alfalfa, 1.92 acres in potatoes and 24.96 acres in beans and other vegetables. Fruit trees were set out subsequent to 1911 and 1914 and 2 acres of fruit trees were set out as late as 1917 at a point near the canal. Some crops were not so good and the fruit yield not so plentiful subsequent to as before 1911, but lack of good care, particularly of the trees, was apparent.



Stefano Sanguinetti, a resident of the State of California, died intestate on the 27th day of May, 1915, and his estate has been administered on and settled and a final decree of distribution entered. He left him surviving as his heirs at law his widow, Geromina Sanguinetti and seven sons and daughters, all of full age, viz: Annie Sanguinetti, Rose Vignolo, Palmyra Mazzera, Fred A. Sanguinetti, Louis R. Sanguinetti, Henry J. Sanguinetti and Silvio T. Sanguinetti. A petition entitled "Amended petition" verified on the 26th day of May, 1919, by the attorney in fact for the heirs above named, and in which they appear as the plaintiffs, is attached to the record herein but such so-called amended petition was never filed in the clerk's office of this court, is in no manner noted or referred to on the docket and leave to substitute parties was never asked of or granted by the court. Said so-called amended petition was verified subsequent to the filing of the requests for findings of fact and briefs.

### XIII.

(No. 32913.)

Silva Sanguinetti, the plaintiff in case No. 32913, was in possession as a tenant of Stefano Sanguinetti, of the lands referred to in the last preceding finding as tract No. 1 and tract No. 2, at the time of the flood of January 30-31, 1911.

On tract No. 2 he had in growth about 30 acres of barley then a few inches high which was destroyed by the flood and was worth \$420.

He also had in growth a crop of onions which was destroyed and which was worth \$300.

23 Two stacks of hay harvested off this land and worth \$300 were washed away and 2,000 gallons of wine of the value \$400 were destroyed.

His contract of renting with his father Stefano Sanguinetti was on the basis of a division of the crops but the proportions to go respectively to the landlord and tenant are not shown.

### XIV.

(No. 32901.)

Richard Russell Smith and Nellie Alice Smith, brother and sister, were each the owner before and during 1911 of an undivided one-half of sections 19 and 20 and parts of sections 21 and 30 in township 2 north, range 6 east, in San Joaquin County, Calif., containing about 1,750 or 1,800 acres of land and lying, at its nearest point, a mile and a half north of the Calaveras River and extending thence northward a mile and a half, and from the junction of the diverting canal and the Calaveras River about two and a half miles northwestwardly, and extending westwardly about  $2\frac{1}{2}$  miles, and from the San Joaquin River about a mile and a quarter northeastward. About 1,400 acres of it were "lowlands" and the remainder



"highlands." These lowlands were part of a large acreage in that locality lying east and northeast of the San Joaquin River below the mouth of the Calaveras and north of the latter, which were originally overflowed or swamp lands, and were reclaimed by constructing reclamation levees and draining and pumping. The Smith lowlands before reclaimed were overflowed lands and when first acquired were under water continually. Reclamation levees were constructed around this land principally for protection against water coming from the east from the San Joaquin River and through sloughs carrying waters from that river, particularly "12-mile slough." Two or three sloughs of considerable size bordered or intersected the Smith lands. Water accumulated in greater or less quantities on these lands, after reclamation, from rainfall and seepage through and under the reclamation levees, and pumping was necessary each year to free the lands of water before cultivation. Conditions were such that if pumping was not resorted to at intervals the lowlands within the reclamation levees would in course of time have become flooded from seepage and accumulated rainfall.

A part of the Smith lowlands could be irrigated by gravity from the river and in the main the lowlands were fertile, productive and valuable. The highlands were not irrigated, and while grain and hay could be grown thereon without irrigation they were not so productive, could not be used for the same purposes and were not so valuable as the lowlands. Part of these lands in and just previous to 1911 were cultivated by the owners, part were rented for 20 per cent crop rental and part were rented for cash rent. Selected lands in small tracts usually rented for the cultivation of onions and similar crops were rented for as much as \$18 per acre.

When during the flood of January 30-31, 1911, the break occurred in the old levee on the north bank of the Calaveras above and opposite the mouth of the canal, as described in Finding IV, the volume of water from that source spreading over the intervening country and augmented by waters flowing down the north side of the river, flowed onto and over and inundated the Smith  
24 lands. Reclamation levees were broken, water from other sources was thereby admitted and added to the volume and these lands, except about 15 acres surrounding the residence, were covered with water to a depth varying from one to a maximum of eight feet.

Some growing crops, particularly barley and onions, were destroyed, some buildings were damaged, and reclamation levees were in places destroyed. The water ran off the highlands after a day or two, but a part of it remained on the lowlands because of their low elevation and retaining levees. Such of that as could be drained off through cuts in the levees was so disposed of, but the remainder had to be pumped out. Whether the water was disposed of as expeditiously as might have been done is not shown, but it was not all removed until such time that it was too late to successfully grow crops on a part of it for that season. These lowlands had been flooded previous to 1911 and had once before that been flooded from the Cala-

veras River. It was customary with farmers in that locality to plant crops after the late winter and early spring floods.

About 300 acres of young barley belonging to plaintiffs and some acreage of onions put in by tenants were destroyed, and hay and perhaps some other crops were damaged by the flood of 1911, and there was a loss of cash rentals otherwise to be anticipated. Some tenants who were to have rented for cash put in crops on shares after the flood. Such crops were not generally good. The damage to the plaintiffs by reason of these conditions was \$12,000. Plaintiffs were put to an expense of \$1,563.98 for pumping, \$5,934.50 for repairing levees, and \$850 for repairing buildings. Some debris collected on these lands which had to be removed at some expense, but there were deposits of silt which were beneficial. The lands, except for damage to crops and temporary interference with cultivation, were not injured. The value of the whole tract, except for the damage recited above entailing expense of repairs, was not depreciated by the flood of 1911. No part of it was permanently flooded thereby and the diverting canal has never so flooded any of it as to prevent its cultivation, except to the extent that it was one of the causes of the conditions recited in 1911.

In 1912 Richard Russell Smith and Nellie Alice Smith granted an option to the California Land Finance Co. to purchase all their lands here involved and on February 25, 1913, entered into a contract of sale of said lands to said company, modified, for some reason not definitely shown, by subsequent agreements, but apparently for the purpose of providing otherwise as to time of payments to be made. The sale price for the entire tract was \$125 per acre, which was a reasonable price and the reasonable value of the land. It is not satisfactorily shown that it could have been sold for a higher price but for the flood of 1911 or but for any thereby increased "impending menace" of floods. The title of record did not pass from the Smiths on the execution of this contract because it was contingent on the performance of the terms as to payments to be made by the grantee. Under the contract the land company "managed the crops" thereafter. The Smiths "had control of it" in 1913, but vacated the premises within a few months after the execution of the contract of sale.

This action was originally instituted on August 18, 1914, by Richard Russell Smith alone, who, in his complaint then filed, demanded \$175,000 as the value of an undivided one-half interest in "Oak Groves Ranch" containing 1,750 acres, "taken by the construction of the Stockton Diverting Canal." Sometime on or subsequent to the 26th day of May, 1919, the date upon which it appears to have been verified, a petition entitled, "Amended Petition," was attached to the record in this case, in lieu of the original petition, without having been formally filed in the clerk's office or noted on the docket and without leave of court. The requests for findings of fact and briefs had then been filed. In this amended petition Nellie Alice Smith, not theretofore a party, is joined as a party plaintiff and the demand is for costs of pumping,

repairing levees, restoring buildings and removing debris, loss of crops and rent money for 1911 and depreciation in value of lands.

## XV.

(No. 31191.)

In case No. 31191, Theodore Infalt, no request for findings of fact has been filed by plaintiff as required by the rules of this court, no brief has been filed by the plaintiff and the plaintiff did not appear either in person or by attorney at the submission of these cases.

## CONCLUSIONS OF LAW.

Upon the facts found the court concludes as matter of law, as to each of said cases, as follows:

No. 32914, Stefano Sanguinetti: That the case is not within the jurisdiction of the court and should be and is dismissed.

No. 32913, Silva Sanguinetti: That the case is not within the jurisdiction of the court and should be and is dismissed.

No. 32901, Richard Russell Smith: That the case is not within the jurisdiction of the court and should be and is dismissed.

No. 31191, Theodore Infalt: That the case should be and it is dismissed because of the facts found in Finding XV and for want of prosecution.

Judgment is rendered against each of the above-named claimants in favor of the United States for the cost of printing the record herein, the amount thereof to be entered by the Chief Clerk and collected by him according to law.

## OPINION.

Downey, Judge, delivered the opinion of the court:

These cases were selected by counsel for submission as representative of about seventy pending cases, in all, founded upon the same general facts. They are submitted together but are not consolidated. For these reasons findings of fact are made which are general in their character and applicable to all the cases, followed by findings as to the particular facts in the individual cases. It is thought that the findings very fully and accurately present the whole situation with which we have to deal and an attempt to restate the facts here in condensed form is not only unnecessary but, since a condensation must sacrifice something of valuable detail, is undesirable. We will refer to the facts found as may be necessary in the discussion of the questions involved.

If there is to be recovery in these cases it must necessarily be upon the theory that there was a taking of the plaintiff's property within the meaning of the fifth amendment to the Constitution.

23 There is much in the record which can only be interpreted as in support of a theory that there could be a recovery for

damages, pure and simple, but that matter is hardly for discussion and the cases are to be treated as for a taking.

It is perhaps appropriate and also important, to the end that we may not lose the proper viewpoint and because also of the suggestion that, in circumstances stated, the distinction between "appropriation of land" and "damage" is a "quibble," that we consider the primary importance of and necessity for the distinction in this court. The fact that the distinction may not be material in California because the constitution of that State provides against "damage" as well as a taking without compensation can be of no force here and the distinction is vital. Perhaps there may sometimes be apparent a disposition to resolve a doubt in favor — a claimant since in no other way can compensation be awarded, but the necessity for the distinction is deep-seated and a proper drawing of the line is of more importance than if it merely involved a liberal interpretation of facts or effects in aid of a deserving claimant. This is because the question to be determined as between a taking and mere damages is in this court jurisdictional. Unless there is a taking within the meaning of the Constitution, implying an obligation to pay, this court is without jurisdiction in this class of cases. There are no presumptions to be indulged in — favor of jurisdiction, it can not be assumed if it does not in fact exist, it can not be conferred by consent of parties it must affirmatively appear, and it is a question for strict construction. The petitions in these cases aver a taking and upon the averment of that jurisdictional fact the court was empowered to hear the cases, but if upon the facts submitted it perchance appears that what the defendant did resulted in the infliction of a consequential injury and did not in fact amount to a taking, it is at once demonstrated that the case is not within the jurisdiction of this court. Therefore, to put a liberal construction on facts appearing to the end that a plaintiff's injuries may be treated as a taking rather than a consequential damage is but to broaden jurisdiction by liberal construction. If we were proceeding under a constitution like that of the State of California it would not be material that the line was not clearly drawn between a taking and damage, for both are included, but under our Constitution the question is primary and vital.

In *Ex Parte McCordle*, 7 Wallace 506, 515, it is said:

"It is quite clear, therefore, that this court can not proceed to pronounce judgment in this case, for it has no longer jurisdiction of the appeal; and judicial duty is not less fitly performed by declining ungranted jurisdiction than in exercising firmly that which the Constitution and the laws confer."

And in *Reid v. United States*, 211 U. S. 529, 539, it is said:

"But jurisdiction is not a matter of sympathy or favor. \* \* \* The courts are bound to take notice of the limits of their authority."

"The facts upon which the jurisdiction of the courts of the United States rests must, in some form, appear in the record of all suits prosecuted before them. To this rule there are no exceptions." *Ex*

Parte Smith, 94 U. S. 456. And a general averment in the petition, sufficient for the purpose at that stage of the case, becomes of no avail for jurisdictional purposes if the facts proven do not sustain it

27 but show the subject matter of the case to be of a different general class as to which there is no jurisdiction. Therefore, the necessity for a strict determination whether the subject matter of the case is a taking or a damage and if the latter, a dismissal, not primarily because it is determined that the plaintiff has not suffered by the acts of the defendant, or because the defendant, the sovereign, has not consented to be liable therefor, but because it has not conferred on the court any jurisdiction to adjudicate the subject matter. In the rather recent case of *Temple v. United States*, 248 U. S. 121 at 131, it is concluded by the Supreme Court that "The District Court, instead of rendering judgment for the United States, should have dismissed the suit for want of jurisdiction." Many other cases recognize the question as jurisdictional.

There are many cases in which the Supreme Court has had before it and has decided questions as to whether the facts showed a taking within the meaning of the fifth amendment or a consequential injury. A review of them at length does not seem to be necessary for present purposes. The deducing of general principles with reference to a few particular cases should serve our purpose.

From the pioneer case of *Pumpelly v. Green Bay Co.*, 13 Wallace 557, we have in another case deduced the rule that "an actual and continuing invasion of one's property by superinduced water effectually destroying or impairing its usefulness constituted a taking under the Constitution though there be no actual conversion to public use." But it should be added, without necessarily reciting the facts in detail, that in this case the overflow was caused by the erection of a dam across a river which was intended to back up the waters of the river, the result of which, clearly to be anticipated, was to overflow the lands in question.

It is well to bear in mind, in the consideration of this class of cases, that when the United States in carrying on its many activities in aid of navigation, builds dams across rivers, the very purpose of the structures is to back up the waters and create pools above the dams. The pools thus formed sometimes extend several miles up the river, dependent on the height of the dam and the fall of the river, and extend up tributaries also. It is a simple matter of engineering to prolong a level from the crest of the dam up the stream and its tributaries and lands, if any, which are below that level, will of course be overflowed at pool level, and a result so easily ascertainable and so certain to follow is to be regarded as intended. When the Government thus with presumed intention takes the lands of another, the Constitution requiring compensation, the implication of a promise to pay therefor naturally arises. In the *Lynah* case, 188 U. S. 445, the court, reviewing the authorities said, "The rule deducible from these cases is that when the Government appropriates property which it does not claim as its own it does so under

an implied contract that it will pay the value of the property it so appropriates."

In the last-named case in which it was found that there was practically a total destruction of plaintiff's plantation and in which it was held that there was a taking, there was a strong dissenting opinion by the present Chief Justice, concurred in by two Associate Justices which, aside from holding that there was no taking under any construction of the findings, called attention to the fact that the majority of the court had evidently construed the findings as

showing that by the construction of the Government's works  
 28 the water had been so backed up in the river as to overflow the embankment protecting plaintiff's lands and thus flood the same. There is at best room for the inference that but for this construction of the findings the conclusion of the majority of the court might have been otherwise, since it is nowhere indicated that this assumed fact was not material to the conclusion reached.

In the Heyward case, 52 C. Cls., 87, involving a plantation adjoining the Lynah plantation and substantially the same facts, this court allowed a recovery, expressly basing its conclusion on the authority of the Lynah case, the Chief Justice stating in a concurring opinion that but for that case his conclusion would have been different. This case, on appeal, was affirmed by an evenly divided court. While the Lynah case, of course, still stands as an authority holding that under the facts shown there was a taking the matters referred to may be proper for consideration as affecting the weight of the authority.

But it is not deemed necessary to review in detail these cases or a number of other well-known cases in which it has been held that there was a taking, some of which have been cited by plaintiff, for it seems to us beyond question, under the facts found, without now referring to them specifically, that the cases before us do not come within any of these cases. Some of them we have considered at length in the opinion of this court and in the concurring opinion of the Chief Justice in *County Court of Marion County, W. Va. v. United States*, 53 C. Cls., 120. We must conclude from plaintiff's briefs that their chief reliance is on the *Cress* case, 243 U. S., 316, and since there is, as it appears to us, a tendency, apparent not only in these but in other cases, to misconstrue the facts upon which the holding in the *Cress* case was predicated, we advert to them briefly.

The facts found by the trial court do not appear in the opinion and it seems not to have been regarded as necessary to state them in great detail. It is shown, however, that the plaintiff in that case was the owner of land on Whiteoak Creek, a tributary of the Cumberland River, and that the United States erected Lock and Dam No. 21 in the Cumberland River and thereby subjected 6.6 acres of plaintiff's land to frequent overflows of water from the river and damaged it to the extent of one-half its value. The dam in question was, of course, below the confluence of Whiteoak Creek with the river, its purpose when in operation must have been, as in all such

cases, to back up the waters of the river and form a "pool" and the further result was necessarily to back up the water in confluent stream within the limits of the pool. In the opinion it is said that the land in question is subject to frequent overflows of water from the river and further, that the findings "render it plain that this is not a case of temporary flooding or of consequential inquiry, but a permanent condition, resulting from the erection of the lock and dam, by which the land is subject to frequent overflows of water from the river," and referring to the principle that "overflowing lands by permanent backwater is a direct invasion amounting to a taking," citing the *Pumpelly* and *Lynah* cases, it is held that "it is the character of the invasion, not the amount of damage resulting from it, so long as the damage is substantial, that determines the question whether it is a taking."

29 It thus seems clear that the court was considering and deciding as to the effect of backwater caused by the dam in the performance of its usual and intended functions, for, aside from the forced inference from the language used, there is no reference to flood waters.

Some misapprehension may have arisen as to the facts of the case because it appears that the land in question was not continuously overflowed but was subjected to frequent overflows, and it might be contended that if the overflow was the backwater at pool level it would be continuous. Such would be the case with a fixed dam, provided there was water enough in the stream above the dam to maintain a pool. But while we have not the facts we venture the conclusion that the case was dealing with a movable dam.

From the record in other cases presented to this court we know that it was frequently the policy of the Government in erecting dams in streams of the general character of the Cumberland River, to erect movable dams the wickets of which might lay on the bed of the river when not in use and be raised when it was desired to put the dam in operation and fill the pool. In such a case there would be no backwater when the dam was not in operation and lands within pool level would be flooded during such portion of the time as the dam was in operation.

In *Chapman v. United States*, 53 C. Cls. 203, we had for consideration the effect of just such a dam built across one fork of the Big Sandy River and, when in operation, backing the water up a tributary stream. The record showed, and we found as facts the portions of a given year when the dam was and was not in operation, and since it appeared that the dam was in operation and plaintiff's lands within pool level flooded so much of the time during cropping season that they were useless for agricultural purposes, we gave judgment for the plaintiff. There could be no difference in principle between such a case and one dealing with an overflow caused by the backing up of the water by a permanent dam. In one case as well as the other the results were the natural consequence of the Government's structure which, it must be presumed to have anticipated and intended.



The petitions in these cases aver a taking. A form petition intended no doubt for use in each of the group has attached to each what is termed a "bill of particulars" setting up the claim of the particular plaintiff. In No. 32914, Stefano Sanguinetti, the claim is for 40 acres of land at \$500 per acre, "taken by the construction of the Stockton diverting canal," 20 acres at \$1,000 per acre, and residence, barn, outhouses, and other improvements valued at \$16,000. In No. 32901, Richard Russell Smith, the claim is for the value of an undivided one-half interest in Oak Grove ranch, containing 1,750 acres, at \$200 per acre, \$175,000. When the cases were submitted there was attached to the record, in lieu of the original petitions, so-called amended petitions verified May 20, 1919, a date subsequent to the filing of the requests for findings and briefs, which had never in fact been filed in the clerk's office or noted on the docket or in any proper way made a part of the record. Aside from other changes the bills of particulars set up the claims on an entirely different basis. In the Sanguinetti case the claim is for "damage to and impairment in value of house," \$7,500, "damage to and impairment in value of land," \$20,000, and "to one barn destroyed by floods of 1911," \$800. In addition there is a substitution of heirs as parties. In Smith's case, No. 32901, by this so-called amended petition, Nellie Alice Smith, a sister of Richard Russell Smith, and the owner of an undivided one-half of the land, is attempted to be joined as a party plaintiff, although any right of action by her was then clearly barred, and the claim is predicated on "damage done by flood waters of Stockton diverting canal in January to March, 1911, as follows:" Cost of pumping out lowlands, repairs to levees and ditches, restoring buildings damaged, removing debris and noxious weeds, loss of crops and rent money, and depreciation in value of land. But, of course, the original petitions are the only petitions which are properly in the record.

Of the cases under consideration, one, No. 32913, Silva Sanguinetti, is for the taking of personalty and one, No. 31191, Theodore Infalt, is not for consideration on its merits for the reasons stated in Finding XV. The other two, both for the taking of real estate, are illustrations of different conditions prevailing in the area affected, one, the case of Stefano Sanguinetti, involving real estate lying along the diverting canal and in the acute angled junction between the canal and the Calaveras River, and the other, the case of Smith, involving real estate lying some distance to the north of the Calaveras River and not near the canal, which was confluent with the Calaveras on its south side, and east of the Smith land.

The primary purpose of the canal was, of course, to divert the water flowing down Mormon Slough away from the city of Stockton and the lower reaches of the canal in that city, where it formed a part of the city's commercial channel, and empty it into the Calaveras River whence it was to find its outlet. Incidentally there was another condition which it must meet. Eastward and northeastward from the canal and between the Mormon Slough and the Calaveras River was an area  $4\frac{1}{2}$  miles wide at the canal, widening a few miles north-eastward to 6 or 7 miles and thence narrowing to a point some 12 or



15 miles northeastward from the canal, with a light descending grade toward the canal. This area, during heavy rains, carried large quantities of water, some falling on the area itself but in larger part due to overflows from the slough and the river along the upper portions of this area, the water flowing, for the most part over the lower portions of the area in depressions or swales but at times flowing over other portions of the land and, before the construction of the canal, temporarily flooding much of this area during heavy rainfall. It is apparent therefore, that the canal, beside carrying the waters of Mormon Slough to the Calaveras must also serve to carry the water flowing over this area to the river.

One of the contentions of plaintiff's counsel, appropriate for reference in this connection, is that it must have been foreseen that "the waters flowing westward during the normal flood season would considerably exceed the capacity of the diverting canal" and why, he asks, if it had not been so foreseen, should the plan include a levee on the south bank of the canal and "where else would it throw the waters except upon the lands of Sanguinetti and the others on the other side of the canal?"

It is shown and found that the flood of 1911 was not "normal" but was unprecedented, unless tradition was correct as to the flood of 1862, 49 years before, at a time when no part of its effects could be charged to the canal, and two preceding high waters in January, 1911, 31 had been cared for by this canal without damage, so far as appears. But aside from that, can the construction of the levee on the southwest bank of the canal with no levee on the northeast bank be construed as indicating a foreseen lack of capacity in the canal and an intention to overflow the Sanguinetti and other lands?

The construction of the levee was a part of the general plan, but why? The canal was approximately  $4\frac{1}{2}$  miles long, 150 feet wide on the bottom with necessarily sloping banks and was estimated to require in its construction the excavation of considerably over a million cubic yards of material. It was necessary, in the first place, that there be an accessible dumping ground for this material. To have removed it from the locality would have so aggravated the cost as to probably make it prohibitive. The right of way had been secured of such additional width over the excavation as to permit of its deposit on one of the banks. The effect of its deposit or a part of it in a levee on the northeast bank on the flow of water over the area above described is so apparent as to need no mention. And aside from all this the conditions to be met certainly indicated that a strengthening of the southwest bank of the canal was good construction. A glance at the map referred to in the findings will show that Mormon Slough, where intersected by the canal, ran nearly but slightly south of west. The canal left it at an obtuse angle and ran thence northwest. Its determined direction indicates the obviating of any sharp change of direction at either end. But there was necessarily a change, the result of which would inevitably cause waters rapidly flowing from the slough into and through the canal to impinge on the southwest bank. This effect would be aggravated rather than otherwise by the force of the waters flowing into the

canal from the area between it and the river. The banks of the canal had a slope of one and one-half on one. The top soil was a light adobe 1 to 1½ feet in thickness superimposed on a red sandy clay without rock therein. It should need no argument to show the necessity for the strengthening of this bank even when the volume of water in the canal was yet within its capacity. Under such conditions it may readily be assumed that erosion of the southwest bank would soon permit gradually increasing escape of water over the lands to the southwest toward Stockton even when the water was below the top of the bank on the other side. But aside from these facts the record shows and we have found that the engineers who made the preliminary investigation and recommended the plan, concluded, on the basis of such information as was available, that the canal as recommended would have a greater carrying capacity than would be required for the expected volume of water. And in fact there is nothing in the record showing any conditions during years preceding 1911 which would indicate that their conclusions were wrong. Abnormal conditions following, which they did not anticipate, caused the trouble.

It seems to us quite clear that, independent of the character of the invasion there was no taking of any of the Sanguinetti land, and add to that the necessary conclusion as to the character of the invasion, together with the fact always to be borne in mind, that the land actually devoted to canal purposes was purchased and not taken, and the idea of a taking under the Constitution with an implied promise to pay seems to be absolutely precluded.

32 What of the Sanguinetti land was "taken" by the United States when it constructed the diverting canal as demonstrated by its operation during the flood of 1911? It was covered with water for two or three days but the water subsided at once, except as to low spots where there was no outlet and where presumably surface waters collected and stood until absorbed by the earth, and the land remained to the use of the owner as theretofore. To what extent it had been flooded before we do not know. Water did to some extent at least flow over it, and the construction of the house with its main floor elevated 6 feet might in the absence of other explanation arouse at least a suspicion that even before the construction of the canal, surrounding waters were anticipated. Débris was deposited which required labor to remove. There were small deposits of sand and gravel, but there were also deposits of valuable silt. If ditches were thus filled up it was again but a matter of labor to restore them. Some trees were washed out and destroyed by the waters. They could be replaced by the original process, and indeed many trees were set out on this land after this and following floods. All of these things were a damage to the owner to the extent of the labor and cash expenditures necessary to restore former conditions. And so as to the very old barn, not of sufficient stability to withstand such conditions. The house alleged to have been taken remained as it was before, except as to the front veranda steps, occupied during the flood, never invaded by the water, except as to the cellar or basement, and occupied thereafter. There was as to it, of course, in-

convenience of access during the flood, and if those conditions were apt to repeat themselves there was probably depreciation in value because of inconvenience of access. But depreciation in value by interference with access does not constitute a taking. *Gibson v. United States*, 166 U. S. 269.

And so it may be admitted that if there was apparent danger of a recurrence of serious floods there was a consequent depreciation in value of the land not because it was not there to cultivate just the same but because a recurrence of floods meant necessity for the expenditure of labor and money for purposes indicated above. When depositions were taken in these cases and plots of these lands introduced in evidence it was shown that less of these lands were uncultivated than before the flood of 1911. They were not so productive but it is not shown that they might not have been. Large claims by all these landowners were pending against the United States and it is shown and found that lack of good care, particularly of the fruit trees, was apparent. But however these conditions in the abstract may present themselves, even if, without regard to other necessary elements, results ordinarily to be regarded as damages, pure and simple, might be construed to be a taking of a part of the land because such damages resulted in a depreciation in value, a result always following a damage, at least until it is repaired, there must be further foundation for an action as for a taking under the Constitution.

We may readily assume it to be settled that the basis of such an action in this court is the implied contract arising out of the appropriation of private property by the United States and the Constitutional provision that it shall not be taken without just compensation. In this connection it may be observed that in considering questions of a "taking" under the Constitution the Supreme Court generally resorts to the use of the word "appropriate." While the two words are in a sense synonymous, the use of the word appropriate in relation to governmental acts seem to carry some peculiar significance. It conveys, as the other does not, an idea of the exercise of a sovereign right to appropriate to its own use some specific thing which it needs for its own proper purposes and does not seem to embrace the idea of a fractional depreciation in value by an inflicted damage to something not in fact appropriated. In the *Lynch* case the governmental right in question is distinguished from a proprietary right and is referred to as "its governmental right to appropriate the property of individuals" and is predicated on the right of eminent domain and the principle that all private property is held subject to the necessities of government.

In a concurring opinion in the *Lynch* case Mr. Justice Brown, stating that he saw no reason for holding that there was an implied contract within the meaning of the Tucker Act, expressed the opinion that, irrespective of the question of contract or tort, jurisdiction could be supported under that clause of the Tucker Act which vests this court with jurisdiction of "all claims founded upon the Constitution of the United States or any law of Congress," and that claims founded on the Constitution might be prosecuted in this court "whether sounding in contract or in tort," but such a theory has never been ap-

proved by the Supreme Court as the rule of jurisdiction in this court in this class of cases.

Quoting from many authorities cited in "Words and Phrases," "Implied contracts are such as reason and justice dictate and which the law presumes from the relation and circumstances of the parties" and "An implied contract is one which the law infers from the facts and circumstances of the case," and "Neither an express contract nor one by implication can come into existence unless the parties sustain contract relations, and the difference between the two forms consists in the mode of substantiation and not in the nature of the thing itself," and "To constitute either one there must be that conviction, mutuality of will, and interaction of parties generally expressed, though not very clearly, by the term 'privity.' Without this a contract by implication is quite impossible." And if contract liability is to result from taking of another's property by the United States is it not essential that there must have been an intention to take? The intention, of course, need not be expressed. It may also be a matter of implication. But it must be fairly inferable from all the circumstances. The inference may be justified when the taking by an overflow is the natural, known or easily to be ascertained result of a governmental enterprise. As in the case of a dam across a stream erected to create a pool above, the land, if any, which will be overflowed thereby is easily and accurately to be ascertained and before, by modern engineering methods, as easily as after the erection of the dam, and such a certain, known or easily ascertained result must be presumed to have been intended. But eliminate such conditions and substitute an entirely unanticipated result of an authorized Government work, a result not susceptible of advance ascertainment and perhaps due also to abnormal and unanticipated conditions and there is no room for an implication of intention. And if the implied contract must arise out of the intention, express or implied, to take coupled with constitutional obligation to pay, it must fail for want of an essential element.

34 In the rather recent case of *Temple v. United States*, 248 U. S. 121, the United States, in aid of navigation, had done dredging in the North Branch of the Chicago River in what was supposed to be the natural bed of the river or at least by dedication or in some other manner a part thereof, but where in fact the stream had been widened by the plaintiff's lessee, for his own purposes, by the dredging out of a part of plaintiff's land and submerging it to a considerable depth. The Government in prosecuting its work had no knowledge that it was dredging plaintiff's land. Plaintiff first demanded possession of that part of the submerged land which had formerly constituted a part of his upland and this demand being refused he instituted a suit to recover the value of that which he claimed had been taken by the Government. Here there was a direct invasion of the land in question and the intention was, of course, to do the very physical thing that was done, but the court said, "If the plaintiff can recover it must be upon an implied contract" and, holding it unnecessary to determine whether or not the

Government's claim of a property right in it was well founded, it said:

"The mere fact that the Government then claimed and now claims title in itself and that it denies title in the plaintiff, prevents the court from assuming jurisdiction of the controversy. The law can not imply a promise by the Government to pay for a right over, or interest in, land, which right or interest the Government claimed and claims it possessed before it utilized the same. If the Government claim is unfounded, a property right of plaintiff was violated; but the cause of action therefor, if any, is one sounding in tort; and for such the Tucker Act affords no remedy," citing *Hill v. United States*, 149 U. S. 593.

And in concluding the opinion the learned Justice says, "The facts preclude implying a promise to pay. If the Government is wrong in its contention, it has committed a tort."

We are, of course, mindful of the fact that there is no analogy between this case and the instant cases because here we have no question of title or of full knowledge as to title but the underlying principle of the Temple case is applicable here and in all cases of this character. We understand the court to have meant in that case that even though it were established that the property in question was the plaintiff's property and even though there was actual invasion thereof, there was no taking for which compensation could be adjudged and no jurisdiction to determine the controversy because, the Government, believing in its own right, could not have intended to take the property of another, there was therefore no proper basis for the implication of a contract and, equivalent to the same thing, the facts, it is said, precluded implying a promise to pay.

Applying the facts found in these cases, particularly to the Sanguinetti lands, perhaps the strongest case of the whole group and for that reason selected as one of those for trial, we find no basis for any implication of an intention to take, even in the minutest degree, or for any implied contract with reference thereto. Facts found as to intention are specifically to the contrary. There was no purpose by the construction of the dam to back up the waters of a stream. The dam built across Mormon Slough was simply to divert the water into a new channel deemed sufficient for the purpose. The Government sent its agents, through whom it must act, to investigate and  
 35 recommend and, based on such data as was available to them, they recommended a canal of dimensions and capacity which they deemed more than sufficient. And but for abnormal, unprecedented floods, their judgment would probably have been vindicated. While the findings refer to the insufficiency in capacity of the canal as an engineering mistake it was not such a mistake as should reflect on them, for in fact they had no warning of the extreme and abnormal conditions to be met. And if any consideration is to be given to the theory that they planned and recommended a canal of known insufficient capacity and by its construction with a levee on one bank thereof they contemplated and intended the overflowing of the San-

guinetti land, may we not wonder why they did not further conserve Government money and energy by building it one-half the width and accomplishing the same purpose? And when they planned the confluence with the river they surely did not intend that the force and volume of the two streams coming together and not finding a sufficiently rapid outlet should back the water onto the Sanguinetti land, for, had such been the intention, they would scarcely have recommended the dredging of the channel of the river below the mouth of the canal to increase its capacity to carry off the combined volume of water.

As to this feature of the situation, the backing up of the water on the Sanguinetti land rather than its overflow from the canal irrespective of its backing up, there was a contributing cause, for which the Government was not responsible, in the bridge or trestle of the Southern Pacific Railroad which crossed the Calaveras River about 500 feet below the mouth of the canal. We can not determine, can only speculate as to how much of resulting conditions were due to this obstruction. Possibly, but for it, the whole volume of water would have found a ready outlet. The findings are that it is not shown directly or inferentially that there was any intention to flood the lands in question or that there was any reason why the engineers in charge should expect or anticipate that such a result would follow. They might have gone further, if an inference in positive form was justified as a finding, and said that the facts and circumstances showed an intention to care for all waters within their intended channels and a well-founded belief that such a result would follow. So far as appears from the record it might reasonably be inferred, if inference as to such a matter was proper or material, that if this canal had been built 40 years before it was it would for all that period have successfully cared for all the water it was required to carry, provided, of course, it had not been permitted to fill up. It happened that this extraordinary flood came the first year after its completion. Subsequent floods, following three years after, approximating but not equaling that of 1911, were aggravated by the fact that the canal had been permitted to fill up by deposits therein and its capacity was thus much reduced. In the case of *Cubbins v. Mississippi River Commission*, 241, U. S. 351, the rule of limitation as to accidental and extraordinary overflows is discussed and is referred to without repetition. It is in attempted avoidance of the rule of this case that plaintiff presents the theory, already sufficiently discussed, that the construction of the levee on the southwest bank of the canal was in contemplation of the foreseen insufficient capacity of the canal and for the intended purpose of throwing the water on the Sanguinetti lands.

36 Plaintiff, in the Sanguinetti case, also discusses the Grizzard case, 219 U. S. 180, using it in support of a theory as to "destruction as a mode of taking" and, if we understand the contention, it is in part that the fact that the right of way for the canal had been bought and paid for is immaterial. In the Grizzard case a strip of plaintiff's land lying on *Tates Creek*, a tributary of the *Kentucky River*, had been submerged and its use for agricultural

purposes destroyed by the erection of a dam across the Kentucky River in aid of navigation. There was no question made as to the right to compensation for the submerged land. The question was as to compensation also for the destruction by the same flooding of an "easement of access" by a public road, running over the submerged land to the Tates Creek pike. Distinguishing authorities "touching an injury to land not taken by the construction of a railroad along and upon a public road," etc., it is said:

"Since, therefore, there has been a taking of a part of the owner's single tract and damage has resulted to the owner's remaining interest by reason of the relation between the taken part and that untaken, or by reason of the use of taken land, the rule applied in the cited cases does not control this case,"

and

"Whenever there has been an actual physical taking of a part of a distinct tract of land, the compensation to be awarded includes not only the market value of that part of the tract appropriated, but the damage to the remainder resulting from that taking, embracing, of course, injury due to the use to which the part appropriated is to be devoted."

Supporting conclusions reached the court cites *Sharp v. United State*, 191 U. S. 341, in which, however, it was held that there could be no assessment of damages as to a separate tract no part of which was taken, and *Bauman v. Ross*, 167, U. S. 548, from which quotation is made holding that "the incidental injury or benefit to the part" (of a parcel of land) "not taking is also to be considered." The infirmity in the *Grizzard* case, if there is any, is in the fact that it is largely rested on the two cases referred to and quoted from which were both proceedings in condemnation. In condemnation the usual rule is no doubt as stated, and we do not question holdings by which we are bound as to its application in the class of cases under consideration, but it is to be observed that if the rule of *Bauman v. Ross* is the rule of this class of cases an assessment of benefits to the remainder of the tract as well as damages is required. But, however that may be, it is apparent that a recovery of damages to the part of a tract not taken is allowed only because of its relation to the part actually taken and because the result of it is in effect a part of that actual taking. There is no analogy in any of the cases under consideration. The lands involved in the *Stefano Sanguinetti* case are parts of tracts out of which the canal right of way was taken but that right of way was bought, conveyed by deed and paid for. In the *Grizzard* case and others like it there was an unquestioned appropriation, "an actual physical invasion," by overflow, of a part of the tract.

The fact of a conveyance suggests another question, not necessary to a determination of the case but proper for consideration.

37 The findings of fact show the procedure in the acquisition of the right of way for the canal. Condemnation was pending against *Stefano Sanguinetti* when, at some stage of the proceedings



not shown, he executed the deed set out in Finding XI, in which the purposes of the grant are fully recited. If the proceedings in condemnation had proceeded to final decree an assessment would have been required, first, of the value of the land taken, and, second, of the incidental damage to the remainder of the tract or tracts, by reason of the taking, including the damage resulting from the use to which the part taken was to be put and including all damages reasonably to be anticipated as a result of the taking and the use. Plaintiff's theory is that an insufficient canal capacity, in times of extreme high water, was foreseen and that a part of the project and a necessary result, evidenced particularly by the construction of the levee on the southwest side, was to cast flood waters on the Sanguinetti lands. While we do not agree with this contention, it must necessarily result that if the theory is correct and if the proceedings in condemnation had proceeded to a finality, such result and damages to the parts of the tracts not taken would have been included or would be deemed to have been included in the condemnation award. A very common exercise of the right of eminent domain by private corporations is the condemnation of rights of way by railroad companies. The juries, usually called to assess the damages, are always instructed as to the elements of damage which they may assess as inuring to the remainder of the tract by reason of the taking and also by reason of the use for railroad purposes of the part taken. Lawsuits against the railroad company by the landowner frequently follow. Sometimes the question arises whether damage complained of is a damage which must be deemed to have been included in the condemnation award, but, that question eliminated, such actions declaring on damages resulting from the construction or operation of the railroad are always actions in tort. We are of the opinion that the deed executed by Sanguinetti, pending condemnation proceedings and so fully expressing the purposes thereof, put him in the same status as if the right of way conveyed had in fact been the subject of condemnation.

But we need not predicate our conclusion on this point, for to us it seems quite clear that this action (Stefano Sanguinetti, No. 32914) cannot be made to rest on an implied contract to pay for any part of or interest in the land in question as for a taking, but is an action in tort of which we have no jurisdiction.

The action of Silva Sanguinetti, No. 32913, is for the alleged taking of growing crops and personal property on the lands involved in the other Sanguinetti case, and the conclusion reached in that case must apply also in this. If this were not the conclusion we might have for consideration the status, in such a case, of growing crops, the fact that he, a tenant, sues for the whole value of the crops alleged to have been destroyed although his tenancy was on the basis of a crop rental, proportions not shown, etc., but the general conclusion, as stated in the case of Stefano Sanguinetti, is sufficient for the purpose and renders other questions of no moment.

As to the case of Smith, No. 32901, it is not necessary to enter into much of detail except to supplement the applicable parts of the discussion in the Stefano Sanguinetti case and differentiate in some re-



spects. The Smith lands in their relation to the canal were radically different. They did not touch the canal, but laid on the north side of the Calaveras River, about a mile and a half north thereof at its nearest point and about two and a half miles, on the opposite side of the river, from the canal. They were low-lands, naturally subject to tidal overflows, were overflowed when acquired by the Smiths, had been reclaimed by reclamation levees, draining, and pumping, and required pumping each year before crops were put in. Further facts as to conditions and what happened during the flood of 1911 are set out in the findings and need not be repeated.

Plaintiff's theory in the Sanguinetti case, and the same counsel appear in both cases, as to the alleged foreseen incapacity of the canal and the intent manifested by the construction of the levee to cast the excess waters on the Sanguinetti lands can have no application, even if conceded to be correct, to the Smith case. The case, it is said, is concerned alone with the flood of 1911, and is predicated on the alleged fact that "the waters of Mormon Slough conveyed through the diverting canal caused the levees on the north side of the Calaveras to break." At least that is the only statement we find in plaintiff's brief as to the cause of the result complained of and perhaps the only statement that could be made. This break occurred on a part of the old levee slightly above and opposite the mouth of the canal and above the portion of the levee which had been strengthened by deposits of materials dredged from the river in the work of increasing its channel capacity from the mouth of the canal down toward the San Joaquin.

To be accurate, it is not found that the waters carried by the canal broke the levee, but facts are found as to the backing up of the waters in the Calaveras by the flow of water from the canal, contributed to by the railroad bridge below, and it is found that as a result of the backing up and embanking of the waters against the levee there was a break. But just how the facts as to the break are stated is probably of slight importance.

Plaintiff then contends that there are but two points in the case; first, the extent of the Smith damage, and, second, the items on which claimants are entitled to recover, following with a discussion of the evidence as to the loss of a barley crop, hay crop, interest in a crop of onions, lost cash rentals, restoring damaged buildings, repairing ditches and levees, pumping out the water, clearing up debris and depreciation in the value of the land "because of the constant menace of the canal," and concludes that there was "(1) a physical taking of claimant's crops and (entire or partial) of his buildings, and (2) a like physical taking to an extent of the naked lands which were actually overflowed, and (3) a taking in the form of diminished value of lands not overflowed." The basis of the claim thus itemized is evidently the bill of particulars attached to the unauthorized amended petition referred to in the earlier part of this opinion and the claim of Nellie Alice Smith, the owner of an undivided one-half interest in the land, is evidently included, although she was never properly made a party to the action, but

so far as the form of the claim of Richard Russell Smith is concerned we can regard it as immaterial to the determination of the merits of the case.

Plaintiff's brief cites to us the Cress and the Grizzard cases, both already referred to, and the Welch case, 217 U. S., 333, and distinguished High Bridge Lumber Co. v. United States, 40 Fed.,

738.

39 The Cress case is cited in support of the proposition that the question is "how much less are claimant's lands as a whole worth by reason of the canal and the 'permanent liability' of parts or all of the same to overflow from that cause." In fact, we have not found that there was any such depreciation, but have found that they were sold for a reasonable price and that it is not satisfactorily shown that they could have been sold for any greater price but for this flood and any "impending menace" of floods. But, aside from these findings as to comparative values, we can find in the facts of this case no room for the application of the Cress case except it be, as here, the use of words disconnected from the context and the facts to which they apply. And the Welch case is cited in support of the proposition that—

"It should now be taken as settled that physical contact of any parts of the lands with the flood waters which have occurred in these past years, and which may be apprehended to occur in future years, is not a condition precedent to an award of compensation respecting that acreage; it is sufficient that the estate at large to which those lands belonged has been injuriously affected in some of its parts or appurtenances."

We quote the proposition because it is due the plaintiff that we should fully weigh the arguments and authorities submitted, but the writer must admit his inability either to grasp it or apply it. The Welch case involved the flooding of a part of plaintiff's land by the operation of a dam built across the Kentucky River, the controverted question being as to a recovery also, in that connection, for the taking or cutting off of access to a right of way by the flooding of the intervening strip. We are unable to apply the case to the one under discussion. We have already referred to the holding in the Grizzard case for which we find no application. To be entirely frank about the matter it must be said that plaintiff has failed to point us to any authorities sustaining his view of this case.

The principles hereinbefore discussed as deducible from the well-known authorities cited seem to exclude the idea that there can be any recovery in this case as for a taking. It is going too far to even discuss the idea that the Government, when it constructed this canal, had or by the remotest possibility could be imagined to have had any intention even remotely to be implied as to the flooding of the Smith lands and there seems to us no possibility of erecting an implied contract out of the circumstances of the case. If the United States was, in manner stated, responsible for damage to those lands it was a tort of which we have no jurisdiction.

The Infalt case, No. 31191, is one of the four originally selected for preparation and trial as illustrative of the group and was there-

fore set and taken under submission with the cases already discussed. It might have been dismissed before submission for the reasons stated in Finding XV, if the attention of the court had been called thereto, and for want of prosecution. Such will now be the order with reference to it. If we are right in the conclusions reached in the other cases it would serve no good purpose to give it a separate consideration.

Graham, Judge; Hay, Judge; Booth, Judge, and Campbell, Chief Justice, concur.

40 In the Court of Claims.

## VI. JUDGMENT OF THE COURT.

At a Court of Claims held in the City of Washington on the sixteenth day of February, A. D., 1920, judgment was ordered to be entered as follows:

The Court, upon due consideration of the premises finds in favor of the defendants, and do order, adjudge and decree that Stefano Sanguinetti, as aforesaid, shall not have and recover any sum in this action of and from the United States; and that the petition herein be and it hereby is dismissed: And it is further ordered adjudged and decreed that the United States shall have and recover of and from Stefano Sanguinetti, the sum of two hundred and thirty-four dollars and seventy-seven cents (\$234.77), the cost of printing the record in this case in this court, to be collected by the Clerk as provided by law.

By the Court.

## VII. HISTORY OF FURTHER PROCEEDINGS.

On April 16, 1920, the plaintiff filed a motion to amend the findings of fact and to set aside the judgment.

On May 24, 1920, the above motion was argued and submitted, and, on June 1, 1920, the motion was overruled by the Court.

On May 28, 1920, the plaintiff presented for filing a motion for leave to file amendment to the petition and to set aside submission in this case and Nos. 32913 and 32901. This motion was overruled by the Court June 7, 1920.

On June 14, 1920, a motion of the heirs for leave to file motion to set aside overruling of motion for new trial was filed and submitted in open court. This motion was overruled by the Court on June 21, 1920.

41 On December 4, 1920, a motion was filed to substitute Jeromina Sanguinetti, adm'x de bonis non of Stefano Sanguinetti, dec'd as claimant.

On December 13, 1920, the Court allowed said motion and filed the following order:

## VIII. ORDER SUBSTITUTING PARTIES.

(Filed December 13, 1920.)

*Order.*

The motion of Jeromina Sanguinetti filed December 4, 1920, came on for consideration by the court, and it appearing that Stefano Sanguinetti, the original plaintiff in said cause, died intestate on or about the 28th day of May 1915, and that the said Jeromina Sanguinetti is the only duly appointed administratrix de bonis non of the estate of Stefano Sanguinetti, deceased, and was appointed as such on June 10, 1919, and the said cause was submitted to the Court of Claims on the 3d day of December 1919, it is now adjudged and ordered by the court as follows:

1. That the said Jeromina Sanguinetti, as administratrix de bonis non of the estate of Stefano Sanguinetti, deceased, be and hereby is substituted as plaintiff in said cause, and this order of substitution is made nunc pro tunc as of the date of the submission of the said cause as aforesaid.

2. That the findings of fact in this and other causes heard together filed on February 16, 1920 (being causes numbered 32914, 32913, 32901 and 31191) be and the same are adopted and reaffirmed as the findings of fact herein.

3. That the conclusion of law in said case No. 32914 (Stefano Sanguinetti) to the effect, "That the case is not within the jurisdiction of the court and should be and is dismissed," is adopted as the conclusion and judgment of the court upon the facts found herein as above stated.

It is further adjudged and ordered by the court that the said cause of Jeromina Sanguinetti as administratrix de bonis non of the estate of Stefano Sanguinetti, deceased, No. 32914, be and the same is dismissed, and that the opinion of the court delivered by Judge Downey in said cause and pronounced February 16, 1920, is adopted as the opinion in said case.

By the Court.

## IX. HISTORY OF FURTHER PROCEEDINGS.

On February 10, 1921, the plaintiff presented for filing a motion to set aside judgment and to admit new pleadings, and motion to amend findings and motion to file new pleadings.

On February 14, 1921, the Court overruled said motions and filed the following order:

## X. ORDER OF COURT.

(Filed February 14, 1921.)

*Order.*

The plaintiff having presented for filing in the clerk's office a motion to set aside judgment in this case and to admit new pleadings, and a motion to amend findings, and a motion to file new petition, the court allows each of said motions to be received and filed; and considering them as filed the court overrules each of the said several motions.

By the Court.

## XI. PLAINTIFF'S APPLICATION FOR AND ALLOWANCE OF AN APPEAL.

Claimant shows to the court that this suit involves more than three thousand dollars (\$3,000.00); that by a judgment of the court rendered on the 13th day of December 1920, claimant was substituted in the stead of Stefano Sanguinetti, her decedent, who was the original claimant, but denying her the right to file a petition or other pleading and dismissing the suit; that thereupon, in less than sixty days after said December 13th, she filed a motion to set aside said judgment and for leave to, as preliminary to the entry of any judgment against, or concerning her, to file her petition and request for findings of fact, and that on the 14th day of February 1921 the court denied said motion. The claimant hereby applies for  
 43 an appeal from said judgment of this court to the Supreme Court of the United States. Benj. Carter, Attorney for Claimant.

Filed May 4, 1921.

Ordered: That the above appeal be allowed as prayed for. By the Court. May 23, 1921.

Court of Claims.

[Title omitted.]

## CLERK'S CERTIFICATE.

I, F. C. Kleinschmidt, Assistant Clerk Court of Claims, certify that the foregoing are true transcripts of the pleadings in the above-entitled cause; of the argument and submission and case; of the findings of fact, conclusions of law and opinion of the court by Downey, J.; of the judgment of the court; of the orders filed by the court; of the plaintiff's application for and the allowance of an appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court of Claims at Washington City this seventeenth day of June, A. D., 1921. F. C. Kleinschmidt, Assistant Clerk Court of Claims. [Seal Court of Claims, Reipublicæ Civibisque.]

Endorsed on cover: File No. 29,184. Court of Claims. Term No. 130. Stefano Sanguinetti, appellant, vs. The United States. Filed October 2nd, 1922. File No. 29,184.

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